

## MEMORANDUM OF LAW

DATE: February 22, 1993

TO: Ann Van Leer, Council Representative, District 2

FROM: City Attorney

SUBJECT: Outfall Mitigation Fund for Point Loma

By memorandum of February 5, 1993, Councilmember Roberts articulated his opposition to the proposed San Diego River Outfall and advocated certification of the pending Environmental Impact Report with the following condition:

Creation of a Outfall Mitigation Fund for Point Loma: Since the fair share policy has been so clearly violated, the city owes compensation to the residents of the Peninsula. I am proposing the creation of a mitigation program, similar to the Mission Bay Sludge Mitigation program, which serves to compensate for the violation of the Fair Share Policy.

This mitigation fund would be dedicated to the Sunset Cliffs Natural Park, a regional park resource located in the Peninsula community (see map). The fund should include monies sufficient to implement erosion control measures at the park, implement projects needed to make the park accessible to the public and create an on-going maintenance fund. Approximately \$5 million is needed for this purpose.

Councilmember Roberts' Memorandum of February 5, 1993 at page 2.

While the source of the funds is not detailed, you have orally asked what legal issues would be raised if the source proposed was the Sewer Revenue Fund. You requested an answer

by February 22, 1993. Lacking a sufficient amount of time for complete research, I agreed to outline the potential problems posed by state law, San Diego Charter and Municipal Code limitations. Each is discussed separately as follows.

1. State Law

The Sewer Revenue Fund is made up of "all revenues" derived from the operation of the wastewater system. San Diego Municipal Code section 64.0403. One such component of the revenue is capacity fees as specified in section 64.0410. However, the use of capacity fees is restricted by state law. California Government Code section 66013 specifies:

Section 66013. Water or sewer connection fees; definitions  
(a) Notwithstanding any other provision of law, when a local agency imposes fees for water connections or sewer connections, or imposes capacity charges, those fees or charges shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed, unless a question regarding the amount of the fee or charge imposed in excess of the estimated reasonable cost of providing the services or materials is submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue.  
¶Emphasis added.σ

Since capacity fees are charged to cover the capital cost of expansion as new users are added to the system, the use of capacity fees is, by state legislation, limited to expansion of the system. Hence, without a two-thirds vote of the electorate, capacity fees that are deposited into the Sewer Revenue Fund may not be used for "mitigation measures."

2. San Diego City Charter

San Diego City Charter section 90.2 defines the "Sewer Revenue Fund," authorizes the issuance of sewer revenue bonds and specifies that all revenues as defined shall be deposited into that fund for the designated purpose of payment of principal and interest of outstanding revenue bonds. To date there are three (3) sewer revenue bond issues outstanding (Sewer Revenue Bonds 1961 Term Bonds, 1966 A and 1966 B) totalling \$15,089,000. Schedule A-2 1992 Annual Financial Report.

Each issue has covenants that pledge sewer revenues and restrict use of sewer revenues except as authorized in the ordinance authorizing the issue. Hence unless a sufficient amount is available and restricted to satisfy the provisions of the above referenced bond issues, expenditures for a park mitigation fund would not be permissible.

3. San Diego Municipal Code

The San Diego Municipal Code establishes and restricts the use of the Sewer Revenue Fund. Section 64.0403 provides:

SEC. 64.0403 SEWER REVENUE FUND  
ESTABLISHED

(a) There is hereby created a "Sewer Revenue Fund." All revenues derived from the operation of the wastewater system shall be paid into the Sewer Revenue Fund.

(b) All revenues shall be used for the following purposes only:

1. Paying the cost of maintenance and operation of the City's wastewater system.

2. Paying all or any part of the cost and expense of extending, constructing, reconstructing, or improving the City's waste-water system or any part thereof.

3. Any purpose authorized by Section 90.2 of the City Charter.

Hence, sewer revenues can be utilized only for the purposes specified in subsection (b). It is urged that the use of the proposed \$5 million is similar to expenses the City pays for sludge mitigation on Fiesta Island. In a 1989 Memorandum of Law (attached), this office did opine that the payment of a fee characterized as "rent" for the use of Fiesta Island for sludge drying was a proper expenditure of Sewer Revenue Funds. We do not believe, however, that the direct use of Fiesta Island to process a direct product of wastewater is similar to expending monies for park erosion control and public access. In our view there is no nexus between the proposed outfall project and the park, and no wastewater or byproduct of same is impacting the park.

That is not to say, however, that section 64.0403 could not be amended to authorize the expenditure of funds for community mitigation matters. Hence section 64.0403(b) could be amended to add a fourth purpose, to the effect of paying for any and all

mitigation costs or for designated compensation.

#### CONCLUSION

The press of time did not permit a more detailed analysis of these restrictions. However, as I promised on February 19th, I have outlined the problems posed by the concept of utilizing the Sewer Revenue Fund as a source of funds for Sunset Cliffs Natural Park. Accordingly, state law prevents any capacity fees being used for this purpose while bond covenants and the San Diego Municipal Code present restrictions on the use of the Sewer Revenue Fund.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

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Attachment:1

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